IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
February 6, 2007 Session

# LECONTE PROPERTIES, LP d/b/a TWIN CITY NISSAN v. APPLIED FLOORING SYSTEMS, INC.

**Appeal from the Circuit Court for Blount County**
**No. L-14571 W. Dale Young, Judge**

---

**No. E2006-01122-COA-R3-CV - FILED APRIL 13, 2007**

---

LeConte Properties, LP d/b/a Twin City Nissan ("Twin City") contracted with Applied Flooring Systems, Inc. ("Applied Flooring") for the installation of an industrial epoxy floor coating in Twin City's car dealership building for a price of $22,000. The floor was installed, and the contract price was paid, but after only a short period of time, parts of the floor began to delaminate or separate into layers. After several unsuccessful repairs were attempted by Applied Flooring, Twin City declined further repairs and demanded a new floor. Applied Flooring refused and this lawsuit ensued. Twin City sued Applied Flooring for breach of contract, negligent misrepresentation, violation of express and implied warranties, and violation of the Tennessee Consumer Protection Act ("TCPA"). Following a bench trial, the trial court awarded Twin City damages for breach of contract, and treble damages, attorney's fees and expenses pursuant to the TCPA, all totaling $159,488.36. Applied Flooring appealed. After careful review, we affirm the award of damages for breach of contract, but vacate the award of treble damages, attorney's fees and expenses because we find no violation of the TCPA.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Reversed and Vacated in Part and Affirmed in Part; Cause Remanded**

SHARON G. LEE, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and D. MICHAEL SWINEY, J., joined.

Robert G. Hinton, Lenoir City, Tennessee, for the appellant, Applied Flooring Systems, Inc.

William J. Carver, Beecher A. Bartlett, Jr., and Chad W. Hampton, Knoxville, Tennessee, for the appellee, LeConte Properties, LP d/b/a Twin City Nissan.

## OPINION

### *I. Background*

Applied Flooring is in the business of installing industrial epoxy floor coating systems. Twin City owns and operates a car dealership in Blount County, Tennessee. On December 8, 2003, the parties executed a contract wherein it was agreed that in consideration of $22,000 to be paid by Twin City, Applied Flooring would install an epoxy coating system over an existing concrete floor in the service shop and adjacent customer service area of Twin City's facility. The installation process entailed the application of two epoxy coatings over the areas specified. The contract provided that "[a]ll work is to be completed in a workmanlike manner according to standard practices" and further provided that the "[p]rice includes all material, labor, freight, any applicable taxes, *standard one (1) year warranty* and is based on one (1) mobilization." (emphasis added).

In January of 2004, Applied Flooring installed the flooring system and Twin City paid the contract price of $22,000. However, within one or two months of the installation, Twin City observed that areas of the flooring were delaminating or separating into layers as a result of bonding failure. Applied Flooring attempted to remedy this problem by patching the delaminated areas; however, this attempt was unsuccessful, and further delamination developed. In April of 2004, Applied Flooring again attempted to fix the problem by reapplying the top coat of epoxy to the flooring system, but this effort was also unsuccessful, as was an additional patching attempt later that month. After Applied Flooring's third unsuccessful repair attempt, Twin City declined any further such attempts and demanded that Applied Flooring remove the entire flooring system and replace it with a new system. Applied Flooring refused, asserting that there was a one-year warranty on the system that limited Applied Flooring's liability to repair or replacement of the affected area only. Twin City attested that prior to this conversation, it had not been advised of these warranty limitations.

On January 27, 2005, Twin City sued Applied Flooring claiming it had negligently installed and failed to repair the flooring system and was liable for damages for breach of contract, negligent misrepresentation, violation of express and implied warranties, and violation of the Tennessee Consumer Protection Act. The complaint was served on Applied Flooring on February 16, 2005. Five days later, the general manager for Applied Flooring sent a letter to Twin City's attorney that stated in pertinent part as follows:

> Applied Flooring Systems installed a 2-coat, 100% solids epoxy coating system at the Twin City Nissan facility. When some unbonding occurred, the owner's representative contacted Applied Flooring and the areas were corrected immediately. The owner's representative was not please[d] with the repaired look and Applied Flooring Systems agreed to re-coat the entire area at no charge.
>
> My last site visit indicated another area needed to be repaired. I immediately tried to schedule the repair, but was told that this would not be satisfactory. My response was another coating could not be applied with Applied Flooring Systems shouldering the entire cost.

> As our warranty states, we will repair any material or labor defect for the one (1) year period, at our expense. If the owner would like to split the cost of another coat of epoxy, we would be willing to consider this option.

No answer having been filed to its complaint, on July 22, 2005, Twin City filed a motion for default judgment. The motion was sustained after a hearing on September 2, 2005, at which no one appeared on behalf of Applied Flooring. However, the default judgment was subsequently set aside when it was shown that Applied Flooring had filed its answer by facsimile on September 1, 2005.

The case was tried on January 25, 2006, after which the trial court entered judgment in favor of Twin City. The judgment reflected that the trial court adopted Twin City's proposed findings of fact *in toto* and further provided in pertinent part as follows:

> Defendant ineffectively intended to change the terms of the contract when it delivered a limited warranty with its invoice for services after the work was performed.
>
> Defendant ineffectively attempted to [waive] the implied warranty of merchantability and the implied warranty of fitness for a particular purpose. The Tennessee Uniform Commercial Code mandates that attempted waivers of implied warranties must be "conspicuous." The purported waivers in this case were ineffective.
>
> Defendant was negligent in the original application of the epoxy floor system and breached its contract with Plaintiff by failing to apply a two-coat epoxy floor in a workmanlike manner.
>
> Defendant's contention that Plaintiff intentionally delayed filing suit until the expiration of the one-year warranty term is unfounded.
>
> Plaintiff in good faith attempted to allow Defendant to remedy the floor on three separate occasions, but these attempted remedies were ineffective.
>
> Defendant breached the Tennessee Consumer Protection Act based upon bait and switch tactics when it delivered various warranty documents well after the parties entered into their initial agreement. Bad faith is further evidenced by Defendant's failure to properly file an Answer in this matter in a timely fashion. In addition, Defendant failed to properly respond to a Motion for Default Judgment filed by Plaintiff.

In consequence of these findings, the trial court awarded Twin City damages in the total amount of $159,488.36 as follows:

> Property damage including the cost of repair to the epoxy floor system in the amount of $33,889.00.
>
> Loss of use of the Service Department in the amount of $14,638.20.
>
> Based on the Court finding that Defendant breached the Tennessee Consumer Protection Act, Plaintiff is hereby entitled to an award of attorney fees and expenses in the amount of $13,906.76.
>
> Based on Defendant's breach of the Tennessee Consumer Protection Act, a total property damage award in the amount of $48,257.20[1] should be trebled for a total property damage award of $145,581.60.

Applied Flooring appeals this judgment.

## *II. Issues*

We review the following issues in this case:

1) Whether the flooring installed by Applied Flooring failed to satisfy the implied warranty of fitness for a particular purpose.

2) Whether the trial court erred in failing to enforce the limited warranty asserted by Applied Flooring.

3) Whether the trial court erred in failing to dismiss Twin City's claims under the Tennessee Consumer Protection Act ("TCPA" or "the Act") as a matter of law upon the ground that the complaint failed to identify the specific provision of the Act that was allegedly violated.

4) Whether the trial court erred in finding that Applied Flooring violated the TCPA by engaging in bait and switch tactics.

5) Whether Twin City failed to properly mitigate its losses.

## *III. Analysis*

### *A. Standard of Review*

[1] We note that this figure is incorrect. The actual sum of $14,638.20 and $33,889.00 is $48,527.20, not $48, 257.20. The correct sum is adopted in this opinion.

In a non-jury case such as this one, we review the record *de novo* with a presumption of correctness as to the trial court's determination of facts, and we must honor those findings unless there is evidence which preponderates to the contrary. Tenn. R. App. P. 13(d); *Union Carbide Corp. v. Huddleston*, 854 S.W.2d 87, 91 (Tenn. 1993). When a trial court has seen and heard witnesses, especially where issues of credibility and weight of oral testimony are involved, considerable deference must be accorded to the trial court's factual findings. *Seals v. England/Corsair Upholstery Mfg. Co.,* 984 S.W.2d 912, 915 (Tenn. 1999). The trial court's conclusions of law are accorded no presumption of correctness. *Campbell v. Florida Steel Corp.,* 919 S.W.2d 26, 35 (Tenn. 1996); *Presley v. Bennett*, 860 S.W.2d 857, 859 (Tenn. 1993).

### *B. Breach of Contract Claim*

#### *1. Implied Warranty of Fitness*

The first issue we address is whether the flooring system as installed violated the implied warranty of fitness for a particular purpose which, in pertinent part, is provided for at T.C.A. § 47-2-315 as follows:

> Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.

Allied Flooring's argument that the flooring is fit for its intended purpose appears to be based upon the ground that Twin City continued to make substantial profit while utilizing the floor. We do not agree that the amount of profit Twin City realized is relevant to the question of whether the flooring was fit for its intended purposes, which were described by Twin City's service manager as follows:

> Q Why did you want an epoxy floor put down over the concrete versus just opening up and working on the concrete?
>
> A Well, for two or three reasons. One, it looks cleaner. It gives us a crisper, cleaner look for our customers. It's easier to maintain and clean. It protects the concrete from any type of chemicals that might be spilled on it.

That these were the intended purposes of the flooring system was further confirmed by the following testimony of Applied Flooring's general manager:

> Q And industrial coating systems restore and renovate concrete, and that is, I believe you told me in your deposition, that it gives a more pleasing appearance than concrete, it protects against chemicals, and it is easier to clean than concrete. Is that all true?

A Yes.

Q So it's not just aesthetics in a car dealership. It also prevents oils from going down into the concrete floor; is that right?

A Yes.

Q And it makes it easier to clean the concrete floor when we know that the cars leak oils or things are spilled on the floor; is that right?

A Yes.

Q And you knew that going into the job with Twin City Nissan; right?

A Yes.

This evidence establishes that the intended purposes of the flooring system were to enhance the appearance of the areas covered, to facilitate cleaning, and to protect the underlying concrete. No proof was presented that the contract was entered into with the expectation that the flooring system would have any effect on Twin City's profits.

The record further shows that the flooring system was not fit for its intended purpose. Applied Flooring's office manager, who inspected the floor on November 9, 2005, stated at the time that it was the "worst application I'd ever seen" and later admitted at trial that there was a "major problem" with the flooring. Photographs presented by Twin City show areas of the floor in the service area where concrete is visible; areas which have obviously been patched and are easily identified by jagged edges and significant differences in texture and color; areas where bubbling of the coating has begun, but the subsurface concrete is not yet visible; and an area where patching was attempted and delamination has recurred. Further, Twin City presented testimony that these areas of delamination and patching are visible to customers through a large picture window in the customer lounge which is located adjacent to the service area. Finally, Twin City introduced expert evidence verifying that the flooring was defective and that remedying the problem would require that the whole flooring system be replaced. All of this proof confirms that the flooring did not meet its intended purposes, and we find no merit in Applied Flooring's argument to the contrary.

### *2. Limited Warranty*

Next, Applied Flooring argues that the trial court erred by failing to enforce its limited warranty which provided in full as follows:

WARRANTY

> Applied Flooring Systems, Inc. warrants to the buyer for a period of one (1) year from the date of substantial completion of the installation of all labor and materials. Warranty covers loss of bond, delamination, and excessive wear.
>
> The warranty shall NOT be applicable if:
>
> 1. The products have not been maintained in conformance with recommended procedures.
>
> 2. The finished surface has been damaged by Acts of God, negligence, accidents, or misuse including, but not limited to, vandalism, acts of war or civil disobedience; or
>
> 3. The finished product is damaged by structural defects of the building or deterioration or failure of building components, including hydrostatic pressure, moisture vapor transmission, faulty substrate construction, etc.
>
> Buyer shall give Applied Flooring Systems written notice of a claim under this warranty within seven (7) days of discovery of noncompliance. *If, upon inspection by Applied Flooring Systems, it is determined that the material and installation have not performed as warranted, Applied Flooring Systems' liability is limited to repair or replace affected areas of failure.* Buyer shall be solely responsible for all cost associated with inspection and testing. The maximum value allowed by Applied Flooring Systems for repair or credit shall not exceed the original purchase price.
>
> No representatives of Applied Flooring Systems has authorization to make any representation or promises except as stated herein.
>
> *There are no warranties either expressed or implied, including the implied warranties of merchantability or fitness for a particular purpose, which extend beyond the warranties contained in this document.* Seller shall not be liable for any incidental, consequential, or other damage including, but not limited to, loss of profits or damages to any adjoining structure or contents arising under any theory of law whatsoever.

(emphasis added).

Applied Flooring seeks to rely on the language of this warranty to exclude the implied warranty of fitness for a particular purpose and avoid any obligation to replace the entire flooring

system as demanded by Twin City. Apparently, Applied Flooring contends that the trial court should have held this warranty to be part of the December 8, 2003, contract, and indicates that Twin City must suffer the consequences of its negligence if it failed to apprise itself of the terms of the warranty as a part of the contract. We do not agree.

The exclusion or modification of a warranty, including the implied warranty of fitness, is addressed by T.C.A. § 47-2-316, which provides in pertinent part at subsection (2) as follows:

> [T]o exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that "There are no warranties which extend beyond the description on the face hereof."

Applied Flooring argues that the reference in the contract to a "standard one (1) year warranty" sufficed to bind Twin City to the limited warranty and its terms. However, under T.C.A. § 47-1-201(1), "conspicuous," as used in the above subsection of T.C.A. § 47-2-316, "means a term or clause so written that a reasonable person against whom it is to operate ought to have noticed it." We do not believe that the mere reference to a "standard one (1) year warranty" constituted notification to Twin City that Applied Flooring intended to limit either the implied warranty of fitness or any other warranty. Applied Flooring further asserts that its routine practice was to mail the limitation of warranties to the customer along with the invoice after installation, as attested to by its office manager and general manager; however, neither of these witnesses was able to confirm that this was in fact followed in this case. Nor did Applied Flooring submit any other evidence that the warranty was provided to Twin City at the time of invoice, and Twin City presented evidence that the warranty was not provided until after suit was filed. In any event, any waiver of implied warranties must be provided at the time of contract, *see Cooper Painting & Coatings, Inc. v. SCM Corp.*, 457 S.W.2d 864, 867 (Tenn. 1970), and providing Twin City with the warranty at the time of invoice would not have satisfied that requirement.

In summary, we find no basis for enforcing the warranty limitations asserted by Applied Flooring.

### *C. TCPA Claim*

#### *1. Specificity of Pleadings*

Next, Applied Flooring argues that Twin City's cause of action for violation of the TCPA should be dismissed as a matter of law upon the ground that Twin City failed to adequately plead such violation. Applied Flooring notes that the TCPA as codified at T.C.A. § 47-18-101, *et seq.* lists thirty-six acts that are prohibited as unfair or deceptive, including a catch-all provision that prohibits "[e]ngaging in any other act or practice which is deceptive to the consumer or to any other person." It asserts that Twin City's complaint merely alleged that "Defendant further violated the provisions of the Tennessee Consumer Protection Act, T.C.A. § 47-18-101 *et seq.,*" and that the complaint

failed to specifically cite or reference any of the thirty-six different acts prohibited under the statute and was therefore, fatally inadequate as to that claim.

Upon our inspection of the record, we do not find that this issue was raised in the court below and is raised for the first time in the present appeal. Therefore, it is our determination that this issue is not a proper matter for our review. In *State, et al. v. DeFriece*, 937 S.W.2d 954 (Tenn. Ct. App. 1996), respondent appealed termination of her parental rights, arguing that the petition for termination failed to comply with certain statutory requirements and that as a result, she was deprived of proper notice under relevant statutory law. We ruled this argument to be without merit, stating as follows:

> We also note that the record reveals that Mother failed to object, prior to this appeal, to any deficiency in the pleadings. The prayer in the Petition provided sufficient notice to obligate her to object to any technical noncompliance with the statute. She had ample opportunity to move for a dismissal or more definite statement, yet she failed to do so. It is well-settled that issues not raised at trial may not be raised for the first time on appeal.

*DeFriece*, 937 S.W.2d at 960.

Because Applied Flooring failed to raise this issue at trial, it is waived.

### *2. Violation of the TCPA*

The fourth issue presented in this case is whether the trial court erred in ruling that Applied Flooring violated the TCPA by engaging in bait and switch tactics.

The TCPA provides,

> [a]ny person who suffers an ascertainable loss of money or property, real, personal, or mixed, or any other article, commodity, or thing of value wherever situated, as a result of the use or employment by another person of an unfair or deceptive act or practice declared to be unlawful by this part, may bring an action individually to recover actual damages.

T.C.A. § 47-18-109(a)(1).

As previously noted, the trial court ruled that Applied Flooring violated the TCPA "based upon bait and switch when it delivered various warranty documents well after the parties entered into their initial agreement."

We respectfully disagree with this ruling.

As used in the TCPA, "bait and switch" is specifically defined as follows at T.C.A. § 47-18-103(1):

> "Bait and switch" or "switch" means advertising items to lure consumers, then inducing the consumers to buy different and more expensive items by failing to make available the goods or services advertised, or by disparaging the less expensive product. Provision of accurate factual information shall not be considered disparagement.

There is no proof in this case that Applied Flooring advertised its flooring system and associated services and then induced Twin City to buy a different or more expensive item by failing to make the advertised flooring available or by disparaging the system as advertised in favor of a more expensive product. Applied Flooring's subsequent attempt to rely upon the limitations in a warranty not provided at the time of contract simply does not meet the Act's definition of "bait and switch." The trial court's ruling that Applied Flooring violated the TCPA is not supported by the record and is therefore, reversed.

In light of our determination that the trial court erred in its ruling that Applied Flooring violated the TCPA, the trial court's award of treble damages based upon such ruling is necessarily vacated.

We further vacate the trial court's award of attorney's fees and expenses in the amount of $13, 906.76, as that award was also based upon the trial court's ruling that Applied Flooring violated the TCPA[2]. For many years, the courts of this state have followed the American Rule which holds that an award of attorney's fees to the prevailing party is against public policy and should not be granted in the absence of statutory authorization or an agreement between the parties which provides for such. *See John Kohl & Co. v. Dearborn & Ewing*, 977 S.W.2d 528, 534 (Tenn. 1998). Upon our reversal of the trial court's ruling that Applied Flooring violated the TCPA, we find no statutory authority for the award of attorney's fees and expenses, and the record reveals no agreement between the parties providing for such an award.

### *D. Mitigation of Damages*

The final issue we address is whether the trial court's award of damages was excessive because of Twin City's alleged failure to mitigate its losses. Applied Flooring observes that from April of 2004, when Twin City declined any further repair attempts and demanded a new floor, until the case was tried in January of 2006, Twin City took no steps to remedy the problems with the flooring system despite its duty to mitigate losses.

---

[2] T.C.A. § 47-18-109(e)(1) provides that upon a finding that the Act has been violated the court may award reasonable attorney's fees and costs.

The duty to mitigate loss is well-established in Tennessee and has been recognized by this court as follows:

> Generally, one who is injured by the wrongful or negligent act of another, whether by tort or breach of contract, is bound to exercise reasonable care and diligence to avoid loss or to minimize or lessen the resulting damage, and to the extent that damages are the result of his active and unreasonable enhancement thereof, or due to his failure to exercise such care and diligence, he cannot recover.

*Cook & Nichols, Inc. v. Peat, Marwick, Mitchell & Co.*, 480 S.W.2d 542, 545 (Tenn. Ct. App. 1971).

Apparently Applied Flooring contends that had Twin City taken proper action to repair the floor, further deterioration would have been forestalled, and the loss incurred by Twin City would have been diminished. We disagree.

As noted, Twin City gave Applied Flooring three opportunities to repair the floor, none of which were successful. Twin City's expert opined that the proper solution to the flooring problem was replacement of the entire flooring system and therefore, it would appear that any further attempt to repair the floor, whether exercised by Applied Flooring or Twin City, would have been an exercise in futility. Twin City presented undisputed testimony that Applied Flooring's attorney was present at the inspection of the flooring on November 9, 2005, and stated that "he would be back in touch with us within one week to try to come to some kind of remedy for the floor" but that that did not happen. Applied Flooring offers no suggestion as to what specific additional action Twin City should have taken to mitigate its losses, nor can we conceive of any means by which it might have done so. Accordingly, we find Applied Flooring's argument in that regard to be without merit.

## *IV. Conclusion*

For the foregoing reasons, the trial court's judgment is affirmed as to the trial court's finding of breach of contract and its award of damages to Twin City for property damage and loss of use, totaling $48,527.20. The trial court's judgment finding a violation of the Tennessee Consumer Protection Act is reversed, and the award of treble damages and attorney's fees and expenses to Twin City is vacated. This cause is remanded for whatever further action may be necessary consistent with our opinion herein. Costs of appeal are assessed to the parties equally.

_____

SHARON G. LEE, JUDGE